petition is founded must not have been reduced to less than #750 and I so hold. The consequence is that in the present case the registrar had no jurisdiction to make the receiving order on 30 May 1985. The words in s. 5(2) state the preconditions which have to be satisfied before there is any statutory jurisdiction to make the receiving order. **It follows from that decision that petitioning creditors should be careful how they accept part tender of a debt pending the hearing of a petition. They are clearly not bound to accept any tender of part payment.**

[emphasis added]

In my view, although in *Re Patel* the issue was slightly different from the present case, nevertheless it can be implied from that judgment that the acceptance of part payment by a judgment creditor after service of the bankruptcy notice or the petition **by itself** does not nullify the bankruptcy notice, so long as the petitioning creditor is careful to ensure that the amount of the debt remaining is not less than the minimum amount stipulated by the Act (and in this country, the amount is ten thousand ringgit).

To sum up, it was my view that the judgment debtor, by putting forward the three new grounds on the day of the hearing, had deviated from the two grounds of objection as set out in her notice of objections and thereby was in breach of r. 117 (this was especially so as regards the first and second grounds), that as regards the third ground, the argument of the judgment debtor's Counsel, with respect, was lacking in merits, and that on the whole I failed to find any material defects whatsoever either in the bankruptcy notice or the creditor's petition. Accordingly I granted the receiving order and the adjudicating order.

RE: UDOS @ ANDREW AK RIGING; *EX-PARTE*: SEABANC KREDIT SDN. BHD.

HIGH COURT, KUCHING
DATO' HJ ABDUL KADIR BIN SULAIMAN J.
[BANKRUPTCY PROCEEDING NO. 95 OF 1994 (II)]
21 JUNE 1994

BANKRUPTCY: Application to set aside bankruptcy notice - Whether debtor had committed an act of bankruptcy - Whether judgment on which bankruptcy notice was based was a final judgment.

The judgment creditor obtained judgment in default pursuant to O. 28 r. 6(1) Subordinate Courts Rules 1980 against the debtor in the Magistrates Court. The debtor applied to set aside the judgment in default which application was dismissed by the learned Magistrate. The debtor appealed against the dismissal of his application to set aside the default judgment. In the meantime the creditor applied for the issue of a bankruptcy notice.

The debtor contended that since the matter concerning the default judgment against him is pending in the High Court, the default judgment is not a final judgment and filed an affidavit to set aside the bankruptcy notice on the ground that it was misconceived and not in accordance with s. 3(1)(i) of the Bankruptcy Act 1967, which provides that a bankruptcy notice is to issue only on a final judgment or final order and execution thereon not having been stayed.

Held:

[1] The judgment, being a default one owing to the absence of the debtor at the hearing of the suit by the judgment creditor against him, is not a judgment on the merits. The default judgment, when entered, did not finally dispose of the rights of the parties, the default judgment being liable to be set aside on the making of an application.

[2] A "final judgment" means a judgment obtained in an action by which the question whether there was a pre-existing right of the plaintiff against the defendant is finally determined, in favour either of the plaintiff or of the defendant. In the present case, the judgment will only be a final one after the debtor has exhausted his remedies given by law. For as long as the debtor had not exhausted his remedies, the fate of the default judgment is not finally determined.

[3] In the circumstances, the debtor, by exercising his right provided by law by filing an appeal with the High Court against the decision of the learned Magistrate disallowing his application to set aside the judgment in default, was challenging the default judgment made against him, and at that stge the judgment did not become final as yet.

[4] The debtor is actively pursuing his rights under the law to have the default judgment set aside and it is through no fault of his that the matter is not yet resolved one way or the other as at the date of the issue of the bankruptcy notice. To hold that the default judgment is a final judgment at the present stage may cause a miscarriage of justice in the event that the High Court decision in the debtor's appeal is in his favour.

[Bankruptcy notice set aside with costs to the debtor].

Cases referred to:
In re Riddel ex parte Earl of Strathmore [1888] 20 QB 512 ***(foll)***
Cheong Kong Enterprise Co. Sdn. Bhd. v. Foong Seong Mines Ltd & Ors. [1969] 2 MLJ 246 ***(refd)***
J.K.R. Leonard v. Official Assignee [1941] MLJ Rep. 30 ***(foll)***
Subramaniam v. Muthiah Chetty [1934] MLJ 222 ***(cit)***
Sovereign General Insurance Sdn. Bhd. v. Koh Tian Bee [1988] 1 MLJ 304 ***(dist)***
Re Walter Su Ex parte United Malayan Banking Corp. Bhd. [1987] 1 MLJ 44 ***(dist)***
Tractors Malaysia Sdn. Bhd. v. Charles Au Yong [1982] 1 MLJ 320 ***(dist)***

Legislation referred to:
Bankruptcy Act 1967, ss. 3(1)(i), 105, 131
Bankruptcy Rules 1969, rr. 18(1), 95, 98, Form 7
Subordinate Courts Rules 1980, O. 28 r. 6(1)(a), O. 29 r. 4

For the debtor - Walter Dior; M/s. Dior & Co.
For the petitioning creditor - Arthur Lee; M/s. Arthur Lee, Lin & Co.
For the Official Assignee - Ko Fui Loong

JUDGMENT

Hj Abdul Kadir Bin Sulaiman J:
This is an application by the debtor to set aside the bankruptcy notice issued against him at the instance of the judgment creditor. I heard the application and on 17 June 1994 delivered an oral judgment setting aside the said bankruptcy notice. I now give my reasons for so doing.

By a Magistrate's Court order dated 28 January 1994, judgment in default pursuant to O. 28 r. 6(1)(a) of the Subordinate Courts Rules 1980 (hereinafter referred to as "the SCR") was entered for the plaintiff on 11 January 1994 against the 1st and 2nd defendant in Summons No. M-72-26-93(A) for the sum of RM10,181.86 together with interest on the sum of RM22,344.46 at the rate of 24% per annum from 20 July 1993 to the date of judgment and thereafter at the rate of 8% per annum from the date of judgment till full and final payment and contractual costs on a solicitor-clients basis in the sum of RM2,021. On 1 March 1994, the 2nd defendant applied that the said judgment be set aside. This application was made within the time period allowed by O. 29 r. 4 of the SCR i.e. within 30 days from the date of the receipt of the order or judgment. The 2nd defendant received the order on 9 February 1994. There was no stay of the execution of the default judgment. While waiting for the hearing of the application, the plaintiff on 18 March 1994 requested for the issue of a bankruptcy notice against the 2nd defendant enclosing a sealed copy of the judgment dated 28 January 1994 above-mentioned. A bankruptcy notice was accordingly issued on the same day against the 2nd defendant demanding a total payment of RM15,116.83 being amount outstanding as at that date, to be paid within 7 days after service of the notice. The said notice was served on the 2nd defendant on 28 March 1994.

On 31 March 1994, the 2nd defendant (henceforth to be referred to as "the debtor") filed an affidavit to have the bankruptcy notice issued by the plaintiff (henceforth to be referred to as "the judgment creditor) set aside intimating that his application to have the said judgment set aside was fixed for hearing on 31 May 1994 and that he has a counterclaim against the plaintiff which he could not have set up in the action in which the said judgment was obtained. The judgment creditor filed an affidavit in reply affirmed by Charlie Kho Chung Hong, its credit controller, on 16 May 1994 deposing that to date there has been no application for an order of Court to stay execution on the said judgment and that the allegation about the counterclaim has no basis in law. On 7 June 1994, the learned Magistrate heard the debtor's application to set aside the default judgment and dismissed the application of the debtor. On 9 June 1994 the debtor filed an appeal with the High Court

against the decision of the learned Magistrate disallowing his application. The appeal is pending in the High Court.

Under r. 95 of the Bankruptcy Rules 1969 (hereinafter referred to as "the Rules"), the filing of the affidavit by the debtor operates as an application to set aside the bankruptcy notice. At the hearing of this application, the learned Counsel for the judgment creditor objected to the procedure adopted in making this application as the application prays for additional matters than is provided by Form 7 to the Rules. He says that the proper procedure would be by way of a summons as provided by r. 18(1) of the Rules. I see no merit in the objection by the learned Counsel for the judgment creditor on ground of procedure as the essence of the application is to have the bankruptcy notice set aside and if it is defective on account of having additional grounds in the application, it will not in any way be prejudicial to the judgment creditor. At the most it was a mere irregularity which would not render the proceedings to set aside the bankruptcy notice void and is saved by s. 131 of the Act.

In essence, by his application, the debtor is saying that since the matter concerning the default judgment against him is pending in the High Court, the default judgment is not a final judgment. It will be a final judgment only when it is finally determined. The issue is very relevant because if the debtor is correct in his argument, the bankruptcy notice issued against him on 18 March 1994 is misconceived and therefore, must be set aside. So this application calls for me to decide whether the default judgment at the time of the issue of the bankruptcy notice was a final judgment. Under s. 3(1)(i) of the Bankruptcy Act 1967 (hereinafter referred to as "the Act") a bankruptcy notice is to issue only on a final judgment or final order and execution thereon not having been stayed.

Having considered the matter, the authorities and the submissions by both the Counsel, I am of the view that, for the purpose of bankruptcy proceedings so as to avoid the possible conflict which I will explain later in the judgment, the default judgment at the time of the issue of the bankruptcy notice, which in this case was on 18 March 1994, is not a final judgment. This is so because, the judgment being a default one owing to the absence of the debtor at the hearing of the suit by the judgment creditor against him is not a judgment on the merits. Any judgment given not on merits is liable to be set aside on an application made. If that be so, the default judgment when entered did not finally dispose of the rights of the parties. In this case O. 29 of the SCR allows the debtor to do so within the period of 30 days. If he does not do so, then and only then, the said default judgment would crystallize into a final judgment. If this happens, after the expiration of this 30 days, the judgment creditor is entitled to request for a bankruptcy notice to be issued. However, in this case, the debtor within time had filed his application to have the said default judgment set aside. On 7 June 1994, the learned Magistrate heard the debtor's application to set aside the default judgment and the application was dismissed. If this matter rested there, then the original default judgment became a final judgment. But it did not, for on 9 June 1994 the debtor exercised his right provided by law by filing an appeal with the High Court against the decision of the learned Magistrate disallowing his application. So by the act of the debtor challenging the default judgment made against him, at that stage the judgment did not become final as yet. So the issue of a bankruptcy notice pursuant to that judgment would not as yet arise. In my view, the said judgment will only be a final one after the debtor has exhausted his remedy given by law. I find support in the *dicta* of Lord Esher MR in *In re Riddel ex Parte Earl of Strathmore* [1888] 20 QB 512 where at page 516 he said:

> In my opinion a "final judgment" means a judgment obtained in an action by which the question whether there was a pre-existing right of the plaintiff against the defendant is finally determined, in favour either of the plaintiff or of the defendant. I think that definition will be found to cover most cases, though perhaps not everyone ... In my opinion the question is, not only was the claim determined, but was it finally determined? It can only have been finally determined if between the two parties to the action it cannot be raised again.

The operative word in the *dicta* is "finally determined". For so long as the debtor had not fully exhausted his remedy the fate of the default judgment is not finally determined. As far as the learned Magistrate is concerned, it may be said that his decision is final for he was *functus officio*. But for the debtor and the judgment creditor the matter can hardly be said to be

finally determined at that stage. The test in *In re Riddel ex Parte Earl of Strathmore* [1888] 20 QB 512 received the approval of our Federal Court in C*heong Kong Enterprise Co. Sdn. Bhd. v. Foong Seong Mines Ltd. & Ors.* [1969] 2 MLJ 246, even though it was not a decision in a bankruptcy matter. This same test was also applied by our Court of Appeal in *J.K.R. Leonard v. Official Assignee* [1941] MLJ Rep. 30, a bankruptcy matter, that an order which is liable to be varied cannot possibly be a final order as it does not finally dispose of the right of the parties. This principle, in my view, equally applies to a default judgment which is liable to be set aside.

If it is to the contrary in that the said default judgment became a final judgment the moment the order of the Court of 28 January 1994 was extracted, there is bound to be a confusion in the event that the appeal of the debtor is allowed by the High Court later on and the default judgment given by the learned Magistrate is set aside. In that event there is no judgment entered against the debtor upon which a bankruptcy notice is to issue. But on the other hand, in the bankruptcy Court, the bankruptcy notice was issued pursuant to the default judgment which was construed as a final judgment. Failure on the part of the debtor to comply with the notice during the requisite period, would be presumed to be an act of bankruptcy on his part which would form a basis for a bankruptcy petition by the judgment creditor which would subject the Court to the making of a receiving order and adjudicating order thereby adjudging the debtor a bankrupt. No doubt under s. 105 of the Act, an application can be made to annul the adjudicating order made against the debtor on the ground that he ought not to have been adjudged bankrupt. But prejudice had been caused to the innocent debtor which, to my mind, is not the intention of the Legislature to create such a state of confusion.

In support of his contention that the default judgment in this case is a final judgment, the learned Counsel for the judgment creditor cited the case of *Subramaniam v. Muthiah Chetty* [1934] MLJ 222 by saying that an order on the face of it is good, made by a competent authority and it must be deemed to be good until it is set aside by whatever procedure as may be prescribed or allowed by law. There is no quarrel about that provided the debtor did nothing to pursue his right given by the law. But the debtor here did not sleep over the matter. Therefore, before his objection is finally adjudicated upon, there is no right in the judgment creditor to request for the issue of the bankruptcy notice under the Act.

It is not in dispute that upon the entering of the default judgment, the debtor did not ask for a stay of execution of that judgment. For that the learned Counsel for the judgment creditor contends that the judgment has become final. No authority was however given in support of the contention. I see no merit in saying so in the light of the further steps taken by the debtor to have the said judgment set aside. However, the issue of no stay of the execution will be relevant only if in the first place that default judgment is a final judgment in the context of the issue of the bankruptcy notice.

Next, the learned Counsel cited the case of *Sovereign General Insurance Sdn. Bhd. v. Koh Tian Bee* [1988] 1 MLJ 304 as laying down the principle that in exercising jurisdiction in bankruptcy, the Judge cannot go behind the judgment by disputing validity of orders when orders have not been set aside. Indeed it is true, but by saying that the default judgment in this case is not a final judgment, I am not in any way going behind the judgment in coming to the conclusion whether the default judgment is a valid judgment or otherwise. What I am saying is the default judgment is being questioned by the debtor through the proper legal process. I would not know what the outcome of his appeal to the High Court in regard to the dismissal of his application to set aside by the learned Magistrate. The course he has taken is allowed by law. So, until there is finality on the issue the said default judgment cannot at the date of the issue of the bankruptcy notice be termed as a final judgment for the purpose of s. 3(1)(i) of the Act. At any rate the facts in the case above-quoted can be easily distinguished from the present matter before me. There the judgment (not clear whether default judgment or judgment on merits) was obtained in January 1976. No steps were taken to have the said judgment set aside or appealed against. In November 1980, after a lapse of more than 4 years, a bankruptcy notice was issued. From the facts, it is clear that by November 1980 the said judgment must necessarily be a final judgment as no step was taken to challenge the judgment when given in January 1976.

Next is the case of *Re Walter Su Ex parte United Malayan Banking Co. Bhd* [1987] 1 MLJ 44 where the application of the debtor to set aside the bankruptcy notice was dismissed. One of the grounds for the application was that an appeal was pending against the summary judgment of the learned Registrar. It was held, *inter alia*, that the mere fact that an appeal is pending over the judgment is not a sufficient ground for staying the proceedings upon the petition of the creditor. It was further held that the Court of bankruptcy will not, as a matter of course, enquire into the validity of a judgment debt, but only when there is evidence that a judgment had been obtained by fraud or collusion, or that there has been some miscarriage of justice. With respect, that case is easily distinguished from the present one on the facts of the case. The facts were clearly laid out at page 45 of the judgment of the learned Judge. At the same page Mohamed Dzaiddin J. (as he then was) had this to say:

> These events are highlighted to show the *bona fide* of the appeal against the O. 14 judgment. In fact, on 30 April 1984 I heard an application by the debtor for stay of both execution and bankruptcy proceedings pending appeal. After submission of Counsel, I dismissed the application on ground that the appeal was not made *bona fide*.

However, in the present case the debtor is actively pursuing his rights under the law to have the default judgment set aside and it is through no fault of his that the matter is not yet resolved one way or the other as at the date of the issue of the bankruptcy notice. The holding of the default judgment as a final judgment at the present stage may cause some miscarriage of justice for the reason I stated earlier in the event the High Court decision in his appeal is in his favour.

The case of *Tractors Malaysia Sdn Bhd v. Charles Au Yong* [1982] 1 MLJ 320 FC, next cited by the Counsel for the judgment creditor is again easily distinguished because there the debtor made no attempt to apply to the Court to set aside the default judgment, though he had plenty of time to do so. So it cannot any longer be disputed that the default judgment there entered was not a final judgment.

So, for the reasons stated, I have no alternative but to find for the debtor/applicant and the bankruptcy notice is accordingly set aside as I am satisfied that the judgment in default given on 11 January 1994 by the learned Magistrate in the circumstances, is not a final judgment for it does not as yet finally dispose of the rights as between the debtor and the judgment creditor. Pursuant to r. 98 of the Rules, I declare that no act of bankruptcy has been committed by the debtor under the notice.

Costs of this application to the debtor to be taxed unless agreed.